Supreme Court, U.S.
FILED
JAN 26 1998
CLERK

No. 97-967

In The

Supreme Court of the United States

October Term, 1997

LEONARD KELLY,

Petitioner,

versus

CITY OF BOSSIER CITY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION

The City of Bossier City respectfully represents:

STATEMENT OF THE CASE

Petitioner herein, Leonard Kelly, seeks discretionary review by this Court of the Louisiana State Supreme Court denial of writs and/or review below. Petitioner sought discretionary review of the decision of the Louisiana 2nd Circuit Court of Appeal wherein that court upheld the judgment of the 26th Judicial District Court in and for the Parish of Bossier, State of Louisiana concerning the demolition of a house owned by Leonard J. Kelly in Bossier City, Louisiana.

The City of Bossier City shows that for the reasons set forth herein, this Court should not grant the writ application of petitioner.

A. STATEMENT OF FACTS

A notice of Bossier City Code Violation was issued on April 5, 1995, to Leonard Kelly. An Order of Demolition was rendered by the City Council of the City of Bossier City at a public hearing on October 17, 1995. The demolition was postponed for Leonard Kelly to remedy the code violations. A second public hearing was held on February 6, 1996, and a second Order of Demolition was issued by the City Council.

Petitioner, Leonard Kelly, filed his original Petition on February 13, 1996. In said Petition, Petitioner, Leonard Kelly, requested an order rescinding the February 6, 1996,

action of the City Council of the City of Bossier City condemning and ordering the destruction of a structure owned by him located at 435 Kelly Street, Bossier City, Louisiana. He further requested a reasonable extension of time to make any necessary repairs to the structure in question. Respondent, City of Bossier City, filed an Answer to the original Petition filed by Petitioner, Leonard Kelly, on February 26, 1996.

A Judgment and Interim Order was rendered on the seventh day of May, 1996, and was signed and filed on the twenty-second day of May, 1996, setting the matter as a first case setting and preference case on the twenty-first day of June, 1996, at 9:30 a.m. The Judgment and Interim Order further ordered the City of Bossier City and all Departments to issue any permits properly applied for which were necessary in order for Petitioner, Leonard Kelly, to complete the construction of the structure in question and bring the same up to code during the interim period.

A stipulation was entered into by the parties in open Court on Friday, June 21, 1996. The trial court determined that all proceedings until the point in the last hearing were proper, the order of demolition by the counsel was proper. It was appealed from that. And today's hearing will only be to determine if Mr. Kelly has complied with the forty-five day order issued by this Court. The trial of the matter was held on June 21, 1996. Defendant, the City of Bossier City, was determined to be entitled to its order to demolish the structure located at 435 Kelly Street. A Judgment was rendered on June 21, 1996, and signed and filed on June 28, 1996. The certificate of the Clerk of Court was filed on July 1, 1996.

B. PROCEDURAL HISTORY OF THE CASE

Petitioner, Leonard Kelly, filed suit against the City of Bossier City, requesting an order rescinding the February 6, 1996, action of the City Council of the City of Bossier City condemning and ordering the destruction of a structure owned by him at 435 Kelly Street, Bossier City, Louisiana and seeking an extension of time to make necessary repairs. On February 13, 1996, an answer to the original petition filed by Petitioner, Leonard Kelly, was filed on February 26, 1996.

A Judgment and Interim Order was rendered on the 7th day of May, 1996, and was signed and filed on the 22nd day of May, 1996, setting this matter for trial on June 21, 1996. The Judgment and Interim Order ordered the City of Bossier City to issue any permits properly applied for by Petitioner, Leonard Kelly.

The trial of the matter was held on June 21, 1996. Defendant, the City of Bossier City was determined to be entitled to its order to demolish the structure located at 435 Kelly Street, Bossier City, Louisiana. A Judgment was rendered on June 21, 1996, and signed and filed on June 28, 1996. The certificate of the Clerk of Court was filed on July 1, 1996.

A motion and order for Suspensive Appeal was lodged by Petitioner, Leonard Kelly, on July 22, 1996. An order granting a Suspensive Appeal was rendered on August 29, 1996. The notice of appeal was filed on August 29, 1996. A motion and order for Devolutive Appeal was filed on September 16, 1996. An order granting said Devolutive Appeal was rendered on September 16, 1996.

A notice of lodging was issued on September 19, 1996, by the Second Circuit Court of Appeal, State of Louisiana. The brief of Petitioner, Leonard Kelly, was filed on October 14, 1996, in the Second Circuit Court of Appeal, State of Louisiana. The reply brief was filed by Respondent, City of Bossier City, on December 3, 1996. A reply brief was filed by Petitioner, Leonard Kelly, on December 13, 1996 in the Second Circuit Court of Appeals, State of Louisiana. The Second Circuit Court of Appeals affirmed the judgment of the trial court and assessed costs against Petitioner, Leonard Kelly, on December 13, 1996.

Petitioner, Leonard Kelly, filed an application for supervisory review on April 14, 1997, in the Second Circuit Court of Appeals. The Second Circuit Court of Appeals returned said application for supervisory review to Petitioner, Leonard Kelly, indicating that he had filed it in the wrong location.

An application to the Louisiana Supreme Court for a Writ of Certiorari was filed on April 24, 1997, in the Supreme Court of the State of Louisiana. The application was denied on June 13, 1997, by the Supreme Court of the State of Louisiana.

Petitioner, Leonard Kelly, applied for reconsideration before the Supreme Court of the State of Louisiana and same was denied on September 5, 1997.

A Petition for a Writ of Certiorari before this Honorable Court was filed on September 17, 1997, requesting review of the decision by the Louisiana Supreme Court.

ARGUMENT

I. NO QUESTION PRESENTED IN THE PETITION PRESENTS AN ISSUE TO BE DECIDED BY THIS COURT.

Section 1257(a) of Title 28 of the United States Code sets forth the law regarding the certiorari jurisdiction of the United States Supreme Court over state court decisions. That section provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

28 U.S.C. § 1257(a). Thus, this Court has no jurisdiction to review a state judgment, except where a federal question is involved.

The Supreme Court stated:

> "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' . . . When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper

> presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' "

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 538, 550 (1987); see also *Exxon Corp. v. Eagerton*, 462 U.S. 176, 180-181 n.3, 103 S. Ct. 2296, 2300-2301 n.3 (1983).

In this case, the Louisiana Supreme Court did not reach any decision regarding a fundamental due process right and was not asked to do so. This Court therefore has no jurisdiction to hear the instant matter.

II. THE DECISIONS BELOW WERE DECIDED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

The United States Supreme Court should not consider state decisions which are based upon independent and adequate state grounds:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (citations omitted). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal suits.* And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we

> corrected its view of federal laws, our review could amount to nothing more than an advisory opinion."

Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S. Ct. 459, 463 (1945) (emphasis added).

This Court only has jurisdiction to hear decisions by state courts which raise federal questions:

> "Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treatises. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed . . . [T]he federal question must be a substantial question."

Justice Brennan, *State Court Decision and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393, 399-400 (1960).

III. THE TESTIMONY BELOW WAS CORRECTLY ALLOWED.

The trial court was correct in allowing the testimony by City of Bossier City employee, Steve Cawthon, regarding the costs connected with the completion of the repairs to the structure located at 435 Kelly Street, Bossier City, Louisiana. The law and jurisprudence has clearly established the scope and relevancy of testimony. Steve Cawthon testified that he was employed by the City of Bossier City, Permits and Inspections Department, as a building inspector. Direct examination revealed that he was familiar with the house located at 435 Kelly Street, owned by Plaintiff, Leonard Kelly.

The trier of fact is just that, a trier of fact. The position of the trial court is to determine admissibility of evidence and to determine the validity of objections. Here, the City of Bossier City called the inspector for the City of Bossier City, Steve Cawthon, and examined him concerning the condition of the house located at 435 Kelly Street, Bossier City, Louisiana. Gary L. Fox, Counsel for Plaintiff, Leonard Kelly, further admitted that Cawthon was an expert building inspector. He did not dispute the price placed upon the materials by Cawthon that it would cost to repair the structure.

The appellate courts may not set aside a trier of facts finding unless it is manifestly erroneous or clearly wrong. *Laborde v. Winn Dixie Louisiana, Inc.*, 563 So.2d 994, writ denied, 568 So.2d 1062 (La.App. 4 Cir. 1990). The testimony in the instant case is not conflicting in any manner whatsoever. No manifest error exists. The testimony of Plaintiff and Steve Cawthon is concurring. When there is a conflict in testimony, reasonable evaluations of credibility and reasonable inference as to fact should not be distributed on review. *Alaywan v. Commercial Union Ins. Co.*, 625 So.2d 243, writ denied, 633 So.2d 166 (La. App. 2nd Cir. 1993). The testimony in question is consistent. Petitioner Leonard Kelly, through his own admissions, admitted that he pled the mercy of the Court. He further admitted that he was granted an additional forty-five days in which to complete the work on 435 Kelly Street, and he ran into problems. Petitioner, Leonard Kelly, admitted to the Court that it was not completed. The testimony questioned by Mr. Kelly of the City of Bossier City Inspector, Steve Cawthon, confirms that the structure was not substantially completed at the time of the

trial of this matter. In the furtherance of the testimony of Leonard Kelly, Steve Cawthon, estimated an additional forty-five days would be required to bring the structure up to code.

Under cross examination Steve Cawthon was questioned by Gary L. Fox concerning what it would cost for materials in order to complete the house and bring it up to code. He estimated Fifteen Thousand Dollars. When a conflict exists in testimony, a reasonable evaluation as to credibility should be made by the trial court and the inferences in evaluations should not be overturned on review. *Summerall on behalf of Summerall v. Quachita Parish School Board,* 665 So.2d 734 (La.App. 2nd Cir. 1995).

No conflicting testimony exists between Petitioner, Leonard Kelly, and the testimony of City of Bossier City inspector Steve Cawthon. No challenge was made as to Mr. Cawthon being an expert or non-expert. Cross examination by Petitioner revealed the costs of the repairs to the structure in question.

The testimony of Steve Cawthon was correctly allowed by the trial court and the proper weight was given to it by the trial court. This court is not in a position to make a determination concerning the testimony of Steve Cawthon because no manifest error was committed by the trial court. Furthermore, no objection was lodged at the trial of this matter regarding his testimony. The testimony of Steve Cawthon should be allowed and the credibility given to it by the trial court should be upheld.

IV. NO MANIFEST ERROR WAS COMMITTED BELOW.

The Court did not commit manifest error by allowing Counsel for Petitioner, Gary L. Fox, to work and perform his job on behalf of Petitioner, Leonard Kelly. The record clearly reflects that Petitioner, Leonard Kelly, never asked that his attorney be discharged from employment or that he be granted leave of court to retain new Counsel. The trial court cannot be held responsible for allowing Gary L. Fox to represent Petitioner, Leonard Kelly.

Any complaint that Petitioner, Leonard Kelly, has concerning his representation by Mr. Fox should be directed to the Louisiana State Bar Association and not to his Honorable Court. It is not proper to ask this Court for relief concerning representation in a civil matter, but said relief should be directed to the Bar Association.

The Trial Court was correct in rendering a Judgment that the house located at 435 Kelly Street, Bossier City, Louisiana, be demolished because of the dilapidated and dangerous conditions of said property. The trial court committed no manifest error in rendering the Judgment allowing the demolition of the house located at 435 Kelly Street. It was stipulated by the parties in open court on July 21, 1996, that the Order of Demolition by the City Council of the City of Bossier City was proper. It was further stipulated that it needed to be demolished because of the dilapidated and dangerous conditions that existed. The findings of the trier of fact cannot be disturbed on appeal absent manifest error, meaning the findings are clearly wrong. *Turner v. City of Monroe,* 634 So.2d 981 (La.App. 2d Cir. 1994). A determination must be

made by the appeal court as to whether the conclusions reached by the trier of fact were reasonable. Id. Unless the findings of fact by the trial court are clearly wrong or manifest error was committed, the appellate court may not set aside the trial court's finding of fact. Id. No conflict in testimony exists in the instant case. Both Petitioner, Leonard Kelly, and the City Inspector, Steve Cawthon, testified that the structure located at 435 Kelly Street, Bossier City, Louisiana was not brought up to code at the time of the trial of this matter. The fact finder was faced with no real decision to make after hearing the testimony from Petitioner and Defendant. The house was not up to code and was not completed.

Based upon the stipulations by the parties and the testimony at the trial of this matter on June 21, 1996, the trial court had no other alternative but to find that the City of Bossier City, Louisiana, was not brought up to code at the time of the trial of this matter. The fact finder was faced with no real decision to make after hearing the testimony from Plaintiff and Defendant. The house was not up to code and was not completed.

Based upon the stipulations by the parties and the testimony at the trial of this matter on June 21, 1996, the trial court had no other alternative but to find that the City of Bossier City was entitled to an Order of Demolition.

CONCLUSION

The Decision rendered by the Louisiana Supreme Court was correctly rendered. Based upon the findings of fact by the trial court and the testimony given at trial, the trial court properly determined that the house belonging to Petitioner, Leonard Kelly, should be demolished. The Judgment of the trial court should be upheld. The writ of application of Plaintiff, Leonard Kelly, should be dismissed at his sole cost.

Respectfully submitted,

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LEONARD KELLY	:	NUMBER: 93,107
VERSUS	:	
CITY OF BOSSIER CITY	:	26TH JUDICIAL DISTRICT COURT
	:	BOSSIER PARISH, LOUISIANA
	:	(Filed May 22, 1996)

JUDGMENT AND INTERIM ORDER

IT IS ORDERED, ADJUDGED AND DECREED, that LEONARD KELLY, Plaintiff in the above entitled and numbered matter, have this cause continued until the 21st day of June, 1996 at 9:30 A.M. as a first case setting and preference case.

IT IS FURTHER ORDERED, that the City of Bossier City, and all Departments, will issue any permits properly applied for, which are necessary in order for Mr. Kelly to complete construction of the structure in question and bring the same up to code during this interim period.

THUS DONE and signed, in Open Court, on this the 7th day of May, 1996.

Signed in Chambers on this the 22nd day of May, 1996.

DEWEY E. BURCHETT, JR.
DEWEY E. BURCHETT, JR.
JUDGE

Approved as to form
and content:

/s/ Michael E. Daniel
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LEONARD KELLY	:	NUMBER: 93,107
VERSUS	:	
CITY OF BOSSIER CITY	:	26TH JUDICIAL DISTRICT COURT
	:	BOSSIER PARISH, LOUISIANA
	:	(Filed June 28, 1996)

JUDGMENT

This cause having come on regularly for trial on this date, law and evidence being in favor of the CITY OF BOSSIER CITY, and against LEONARD KELLY and for reasons this day orally assigned

IT IS ORDERED, ADJUDGED AND DECREED, that the structure located at 435 Kelly Street is ordered demolished.

JUDGMENT RENDERED in Open Court on this the 21st day of June, 1996.

JUDGMENT SIGNED IN CHAMBERS on this the 28th day of June, 1996.

DEWEY E. BURCHETT, JR.
DEWEY E. BURCHETT, JR.
DISTRICT JUDGE

Prepared by:

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Judgment rendered April 2, 1997.
Application for rehearing may be filed
with the delay allowed by art. 2166,
La. C.C.P.

No. 29,418-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

LEONARD KELLY — Plaintiff-Appellant

versus

CITY OF BOSSIER — Defendant-Appellee

* * * * *

Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 93,107

Honorable Dewey E. Burchett, Jr., Judge

* * * * *

LEONARD KELLY — In Proper Person

T. CLAYTON SIMMONS
Assistant City Attorney — Counsel for Appellee

* * * * *

Before MARVIN, HIGHTOWER and GASKINS, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16-3, Uniform Rules, Courts of Appeal.

GASKINS, J.

Leonard Kelly, in proper person, appeals from a trial court judgment directing the demolition of a house he owns in Bossier City. We affirm.

FACTS

Mr. Kelly, the appellant, owned a house located on Kelly Street in Bossier City, Louisiana. Commencing in April 1995, Mr. Kelly began receiving notices of Bossier City code violations pertaining to the condition of this structure. Orders for demolition of the house were issued by the City Council of Bossier City in October 1995 and again in February 1996.[1]

On February 13, 1996, Mr. Kelly filed suit against the City of Bossier complaining of the city council order issued February 6, 1996, which condemned and ordered the destruction of his house on Kelly Street. Mr. Kelly contended that the house was structurally sound and that its demolition was not warranted.

On May 7, 1996, the trial court continued the case until June 21, 1996, giving Mr. Kelly 45 days to bring the house up to code specifications. (In court, the judge informed Mr. Kelly that this was his "absolute last chance" to correct the situation.) The City of Bossier was ordered to issue all permits properly applied for and which were necessary to complete construction and to

---

[1] Although evidence in this record is scant, both sides concede these undisputed facts in their briefs. Mr. Kelly admits in his original brief that the first order of demolition was postponed by the city council in order to give him an opportunity to remedy the situation.

bring the structure "up to code." An interim order to that effect was signed on May 22, 1996.

The case came before the trial court on June 21, 1996, for a determination of whether Mr. Kelly had complied with the court's 45-day order. The parties stipulated that all proceedings up to that point *and* the order of demolition by the city council were proper. Mr. Kelly testified that he had made a number of repairs. However, he stated that he required at least another 30 to 45 days to complete the necessary renovations. He testified that he had been unable to do so previously because of financial problems. On cross-examination, he admitted that he had never taken out a permit for the electrical work on the house and that the plumbing permit had only been taken out the previous day.

The City presented the testimony of Steve Cawthon, a building inspector for the Bossier City Permits and Inspections Department. According to his testimony, a permit to work on the house had been issued June 10, 1996. Mr. Cawthon inspected the premises in question on June 14, 1996, and found Mr. Kelly ripping out floors and discovering serious termite damage. On June 20, 1996, Mr. Cawthon returned to the house. Although some renovations had been done, Mr. Kelly still had a substantial amount of work to perform, including the renovation of the entire electrical system, in order to bring the house "up to code." Mr. Cawthon estimated that about seven days of work had been performed on the house in the last 45 days. On cross-examination, he further estimated that it would take $15,000 in materials alone to bring the house up to code specifications.

At the conclusion of the evidence, the trial court ordered the demolition of the house. In its oral reasons for judgment, the trial court noted not only the efforts of the city to work with Mr. Kelly, but also the fact that the trial court itself had given Mr. Kelly additional time to remedy the situation. However, Mr. Kelly was, in the words of the trial court, "a champion of procrastination." On June 28, 1996, the trial court signed an order directing the demolition of the house.

Although Mr. Kelly was represented in court by Gary Fox, Mr. Fox subsequently moved this court for permission to withdraw as plaintiff's counsel, stating that Mr. Kelly had discharged him. He also asserted that Mr. Kelly had threatened him. The motion was granted. Mr. Kelly filed a response in which he admitted firing Mr. Fox but denied threatening him.

On appeal, Mr. Kelly proceeded in proper person, raising three assignments of error.

COST OF REHABILITATION

In his first assignment of error, Mr. Kelly contended that the trial court erred in allowing testimony from Mr. Cawthon as to the cost of rehabilitating and bringing the house "up to code." However, this question was asked – without objection – by Mr. Kelly's *own counsel.* Consequently, Mr. Kelly cannot be heard to complain about it on appeal.

LEGAL REPRESENTATION

Next Mr. Kelly complained that the trial court erred in "allowing plaintiff not to have competent/legal representation." He asserted that his attorney did a poor job on his behalf and that the trial court should have taken some action to protect him from his *own retained counsel.*

Mr. Kelly hired Mr. Fox to represent him in the present matter. The trial court in the instant civil case was under no obligation to advise Mr. Kelly about the quality of the legal representation he was receiving from the attorney he employed to protect his own interests. Thus, the court's alleged failure to take some unspecified action on behalf of Mr. Kelly cannot be an issue on appeal.

If Mr. Kelly is dissatisfied with the services rendered on his behalf by Mr. Fox, the proper forum for such grievances is either in a complaint to the Louisiana State Bar Association or in a suit for legal malpractice.

DEMOLITION ORDER

In his final assignment of error, Mr. Kelly argued that the trial court erred in ordering demolition of the house because there was no evidence that it was in a dilapidated and dangerous condition. However, we note that at the beginning of court on June 21, 1996, the parties stipulated that all proceedings up to that point and the order of demolition by the city council were proper and that the sole purpose of the hearing was to determine whether Mr. Kelly had complied with the court's 45-day order.

Stipulations have the effect of judicial confessions. They become the law of the case and are binding on the trial court "when not in derogation of law." *R.J. D'Hemecourt Petroleum, Inc. v. McNamara,* 444 So. 2d 600 (La.1983), cert. den., 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 39 (1984); *Comberrel v. Basford,* 550 So. 2d 1356 (La. App. 5th Cir. 1989), writs denied, 556 So. 2d 1284, 1286 (La. 1990). A judicial confession constitutes full proof against the party who makes it. See La. C.C. art. 1853. Such a confession is designed to dispense with evidence and has the effect of withdrawing the subject matter of the confession from issue. *Davis v. Kreutzer,* 93-1498 (La. App. 4th Cir. 2/25/94), 633 So. 2d 796, writ denied, 94-0733 (La. 5/6/94), 637 So. 2d 1050; *Fisher v. River Oaks, Ltd.,* 93-677 (La. App. 5th Cir. 3/16/94), 635 So. 2d 1209, writ denied, 94-0932 (La. 6/3/94), 637 So. 2d 503. However, in order for these effects to be imposed, the order party must have detrimentally relied on the statement or was led to believe that the fact was not at issue. *Fisher, supra.*

In the instant case, the parties stipulated to the correctness of all prior proceedings and the city council's order of demolition. Relying upon these stipulations, the city presented evidence on the only issue still before the trial court – whether Mr. Kelly had availed himself of the opportunity to bring the house in compliance with code specifications. By his own admissions, he had not done so.

Based upon our review of the limited issues before us, we find no manifest error in the judgment of the trial court. Accordingly, it is affirmed.

CONCLUSION

The judgment of the trial court is affirmed. Costs are assessed against the appellant.

AFFIRMED.